IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

FRIDAY, THE 2ND MARCH 2007 / 11TH PHALGUNA 1928

CRL.A.No. 1618 of 2004()

SC.92/2001 OF THE ADDITIONAL SESSIONS JUDGE, FAST TRACK COURT NO.I (ADHOC), MANJERI
.....

APPELLANT: IST ACCUSED.

MOIDEENKUTTY, S/O.MOHAMMEDKUTTY,
MELATH YARIARTHODI, PERUVALLUR, AMSOM PUTHUR,
PALLIKKAL.

BY ADV. SRI.K.A.JALEEL
SRI.T.T.MOHAMOOD
SRI.P.A.ABDUL JABBAR

RESPONDENTS: COMPLAINANT.

THE STATE OF KERALA, REP. BY THE
CIRCLE INSPECTOR OF POLICE, TIRURANGADI,
CRIME NO. 90/98, OF THENHIPALAM POLICE STATION,
REP. BY THE STATE PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM, KOCHI 31.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 02/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

Crl.A.No.1618 OF 2004

Dated 2nd March, 2007

JUDGMENT

Koshy,J.

Four persons were charge sheeted for offences punishable under sections 302 and 326 read with Section 34 of the Indian Penal Code. Accused Nos.2 to 4 are wife and two daughters of the first accused. Case against the third accused, being a Juvenile offender, was split up and accused Nos.1,2 and 4 faced trial before the Sessions Court. The Sessions Court acquitted A2 and A4 and convicted A1 for the offences punishable under sections 302 and 326 of the Indian Penal Code for murdering one Moideenkutty and also for causing injuries on his wife (PW2). From the evidence it can be gathered that very close to the house of A1, there was a pond without water called `Ambalakulam' and a civil case was pending during the relevant time. There was a dispute that it belonged to the accused and that was questioned by the deceased as well as husband of PW1 and others. A1 and A2 filed O.S.No.166/1997 in which husband of PW1 as well as deceased and another four persons were the defendants and A1 and A2 got an order of injunction against the defendants from entering into the property and disturbing their rights of possession. Exts. D1 to D4 will prove the same.

2. The prosecution case is that on 10.4 1998, PW1 and her cousin (PW3) came to take water from the above pond with MO4 pick axe, MO5 spade and Mos 6 and 7 buckets. They digged one place and some water was found. Then they started to dig another place. By the time, A1 came there and questioned them. More or less at the same time husband of PW1 also came there and there was an altercation between A1 and the husband of PW1. Then A2 and A3 came to the spot and compelled A1 to go back to his house. It is the case of the prosecution that husband of PW1 also left the place. Then the deceased Moideenkutty reached the spot and encouraged the women to continue with their pursuit. A1 did not like the intervention made by the deceased and an altercation developed between them. By that time, A2 to A4 took A1 to their house and locked him in the house. But, by somehow or other, he came there followed by A2 to A4 and inflicted serious injuries on the deceased. Then PWs 1 and 3 cried aloud. On hearing their cry, wife of the deceased (PW2) also arrived there and she tried to save her husband. But, all the accused inflicted injuries on them and as a result of the injuries sustained, Moideenkutty died. PW2, wife of the deceased was hospitalized for eight days. Ext.P2 is the wound certificate in respect of PW2. In the wound certificate also history and alleged cause of injury was stated as the injuries inflicted by A1.

3. PW1 gave Ext.P1 F.I. Statement. In Ext.P1 it is stated by PW1 that she along with PW3 went to the nearby pond with the intention to get the muddy water by digging the pond on the southern side. While they were digging, A1 came there and asked them why they were digging the pond which is involved in a civil case. At that time, his wife taken him to the house. Then the deceased came there. A1 was taken to the house and locked inside the house and they heard sounds as A1 was shouting to open the door. His wife A2 and children A3 and A4 came near the pond. Immediately A1 came with a sickle and quarrelled with the deceased. Thereafter, he inflicted injuries on the left hand of the deceased. Even though deceased tried to prevent the same, again he was inflicted with injuries and he fell down. By the time, A2 and A3 came with sickles in their hands and they also inflicted injuries on the deceased. Then, PW2, wife of the deceased came there. A1 inflicted injuries on PW2 also. Seeing that neighbours are gathering there, A1 to A4 went back to their house. PW1 also identified the weapons used by the accused as well as the pick axe, spades and buckets brought by them. A slightly different picture was given by PW1 during evidence. According to her, she along with PW3 went to the pond with one spade, pick axe and buckets (marked as MOIV to MOVII) and started to dig the same to find water. Then A2 came and returned.

Thereafter, husband of PW1 (not examined) came and asked them to return to the house. By the time A1 came. Then there was quarrel between A1 and her husband. Thereafter, according to PW1, her husband left and deceased Moideenkutty came there and asked PW1 and PW3 to continue to dig as it is for water. Then a quarrel started between A1 and the deceased. Then A2 took A1 to their house. She deposed in chief examination as follows:

Thereafter, according to PW1, A1 came there with a sickle after breaking open his house and started quarrel and A1 inflicted injuries on the deceased with the sickle. It is also deposed that Shahul Hameed (not examined), son of the deceased, also came there and interfered in the matter. She deposed as follows:

Thereafter, PW2, wife of the deceased, as well as A2 to A4 came. A2 and A3 having sickles with them and A1 and A3 inflicted injuries on PW2 also. A2 and A3 put their sickles in the pond and left. Thereafter, deceased and PW2 were taken to the hospital. She admitted that accused also sustained injuries by the sickles in their own hands and none of them caused injuries to him. She also stated that deceased was the leader in objecting A1 in cultivating the pond. In cross examination she stated that her husband asked her to go and she was preparing to go when the incident occurred. She stated that her husband was also there at the time of incident. She deposed as follows:

She further deposed that A1 argued that it was his property, but, deceased stated that it can be used by public and struggled started. She deposed as follows:

She admitted that she is an accused in counter case. She again deposed that she was asked to go by her husband after

A1 came. In Ext.P1 there is no allegation that A2 inflicted any injuries on PW2. Evidence of PW1 shows that PWs 1 and 3 came there to take water from the disputed pond when A1 obtained an injunction against them. PW1 & PW3 were supported by the deceased, his son and husband of PW1. Son of the deceased and husband of PW1, material witnesses, were not examined.

4. PW2 is the wife of the deceased. According to PW2, she came there hearing the cries of PW1 and PW3 and when she came she saw her husband lying in a pool of blood. Later she stated that when she came she saw A1, A2 and A3 inflicting blows on the deceased. She deposed as follows:

Then she tried to push away A2 and A1. A2 and A3 inflicted injuries on her. She stated that she is not aware whether accused sustained injuries or not. She had conscious when she met the doctor and she stated to the doctor also that all four accused inflicted injuries on the deceased. She was attacked only by A1 and A3. PW3 who is a close relative of PW1 also deposed that PW1 and herself came to the pond with pick axe, spade etc. to take water and there

was quarrel between A1 and husband of PW1. According to her, husband of PW1 asked them to return and he left. Then deceased came and asked them to continue to dig. Then dispute occurred between A1 and deceased. A2 to A4 forced A1 to go to his house. Thereafter, A1 came with a sickle and attacked the deceased. Son of the deceased Shahul Hameed also came but while A1 attacked him, he ran away. Then large number of people came. PW2 also came. According to her, A2 to A4 again inflicted injuries on the deceased who fell down. When PW2 tried to remove A2, A1 and A3 inflicted injuries on PW2 also. In cross examination PW3 admitted that most part of the land in the disputed pond was cultivated by A1. She stated as follows:

She also stated that she is an accused in the counter case. PW2's husband is also an accused. She further stated that there was wordy quarrel between A1 and husband of PW1. At that time, deceased came there and asked them to continue digging. She deposed as follows:

Thereafter struggle started. She further stated that they have no case that the place in dispute is their own place. Evidence of PWs 2 and 3 would also shows that the earlier part of the incident was started by a quarrel between the husband of PW1 as well as A1. Thereafter, deceased also came there. Merely because PW1 to PW3 were closely related to the deceased, their evidence cannot be ignored. Their presence at the time of occurrence is admitted. But, their evidence needs more careful scrutiny and it is for the court to find out the truth. Admittedly, there are lot of exaggerations in the evidence and the evidence of PWs 1 to 3 will not tally. They were suppressing the injuries on the accused. Apart from close relationship, they are accused in the counter case. Effort is also made by PWs 1 to 3 to avoid any involvement in the incident by husband of PW1 who started the incident and son of the deceased also interfered in the dispute. We are accepting only believable part of their evidence.

5. Now, we will come to the injuries noted by the doctor who conducted postmortem examination of the deceased. In Ext.P4 certificate the following injuries were noted:

"**B. INJURIES (ANTE-MORTEM) EXTERNAL:**

1. Contused abrasion 2x0.5cm upper lip mid portion.

2. Incised wound 3.5x1cm left side of front of chest oblique inner lower end 2.5 cm above nipple upper outer end 13 cm below collar below 7 cm outer to armpit (anterior axillary line).

3. Contusion 5x1cm left side of chest oblique, upper inner and 6cm outer to midline 17 cm below collar bone.

4. Incised wound 36 x 7cm back of left upper arm and shoulder, upper back end 7 cm below top of shoulder 9 cm outer to midline. Lower end on the bony prominence of elbow joint exposing the cut muscles underneath. The muscles were contaminated with mud. Vessels were found cut at multiple sites, bone was exposed at some areas.

5. Lacerated looking incised wound 3.5x2.5 cm back of left forearm 5 cm below outer bony prominent elbow joint enclosing a punctured lacerated wound 0.8x1.5 cm at the middle.

6. Abrasion 6x0.3cm back of left forearm upper portion 1.5 cm above injury No.5.

7. Superficial incised wound 1.5x0.4 cm outer aspect of root of left index finger.

8. Four linear superficial incised wounds (0.8 0.6, 0.5 and 0.7 cm above downwards at a distance 0.5, 0.5 and 0.7 cm outer aspect of left finger, 0.6 cm, below injury No.7.

9. Superficial incised wound 2 cm x 0.2 cm front of left palm 2 cm below 1st web space.

10. Lacerated wound 1.2x0.3cm front of left palm with tailing for 1 cm inwards; 1cm below injury No.9.

11. Abrasion 0.7x0.2 cm inner aspect of left palm 1 cm below wrist.

12. Linear abrasion 8 cm back of left palm, 3cm below back portion of injury No.11.

13. Contused abrasion 6.0.6cm left side of abdomen, horizontal 6 cm above iliac crest.

14. Abrasion 1.5x1.6 cm outer aspect of abdomen 1cm below middle of injury No.13.

15. Multiple contused abrasions 6x5.5cm back of left side of abdomen 5 cm outer to midline, over iliac crest.

16. Lacerated wound 3 x 0.5 cm, superficial back of right side of chest oblique, lower inner end 3.5 cm outer to midline 20 cm above iliac crest.

17. Contused abrasion 1x0.5cm inner aspect of root of right big toe.

18. Incised wound 8.2cm, bone deep front of right knee horizontal, both ends pointed. The wound was contaminated with mud particles.

19. Superficial incised wound 4x0.8cm vertical inner aspect of right thigh, 16 cm above knee.

20. Incised wound 6.5x2.5 cm oblique with tailing for 3cm downwards and to the front, upper back end 6 cm below natal cleft (Right side).

21. Incised wound 7.5x2.5cm, bone deep, horizontal right upper arm, 7.5cm above elbow, cutting the muscles and vessels.

22. Graze abrasion 7.5x4cm outer aspect of right shoulder with tailing towards elbow.

INTERNAL

1. Fracture separation of cervical spine

> between 5 and 6. Spinal cord was intact."

According to the doctor, the deceased died due to multiple cut injuries sustained by him. He also had fracture of cervical spine prior to death. Doctor was examined as PW5. It is not stated by the doctor that any of these injuries or all injuries together are sufficient enough to cause death in the ordinary course of nature. Further, he stated that internal injury was not the direct cause of death. He stated as follows:

> "I agree that internal injury was not the direct cause of death. None of these injuries are on the vital organ. Death was due to profuse bleeding. I have not noticed external corresponding injury to the fracture of cervical spine. If a person is attacked with MOI to MOIII (any one of them) there must be external injury. Such an injury can be caused even due to a fall."

He also stated on a court question that death can be caused due to combined effect of all these injuries, but, he did not see accumulation or collection of blood anywhere inside the body cavity. He further stated that injuries were of superficial.

6. Exts.P10 and P11 are the wound certificates of

A1 and A2 which show that serious injuries were caused to A1 and A2. Ext.P10 issued to A1 shows the following injuries:

> "(1)Contused laceration 3x2x2cm on Rt. gluteal region. (2) Cut injury (L) little finger 3x1x1 cm as its base. (3) Incised wound 2x0.5x1cm. on Lt. ring finger (4) Contused lacerated wound 3x3x1cm. on Lt. side of the back. Number of additional sheets if any."

It is stated that the injury was sustained at 10.30 a.m. and cause of injury was `cutting by Moideenkutty (deceased) while doing duties in the field'. It is also stated that there was mud all over the body. Ext.P11 wound certificate of A2 shows the following injuries:

> "(1) L.W 1x ¼ cm. on the dorsum of Lt. Hand (2) LW 10x2x1cm. On the Rt.dorsum of wrist. (3) contused L.W.1x1x1 cm Rt. Forearm lower part (4) Contused L.W. Dorsum of Lt. Hand 1x4x3cm. (5) L.W. 1x1x1 cm. distal forearm. (6) L.W. 8X1x1 cm. middle of Lt. Forearm. (7) Contused lacerated wound 8x1x1 cm. middle of Lt. forearim. (8) Contused laceration terminal phalanx of Rt. index finger. C/o pain all over the body."

There also the same reason is stated as cause of injury and doctor noticed mud all over the body. Exts.P12 and P13 wound certificates were issued for A3 and A4, but, the injuries were not serious.

7. Defence of the accused is based on protection to person and property. Apart from the exaggerations made by prosecution witnesses and contradictions made between the witnesses, we are of the opinion that in Ext.P1 it is not stated that the accused sustained any injuries. Even in the trial there is no such explanation. It is true that the accused has to prove the exceptions provided under Sections 96, 97 & 105 of I.P.C. Despite the plea of self defence, prosecution has to prove the charges beyond reasonable doubt. But, accused need not establish the plea of private defence to the hilt and can discharge his onus by establishing preponderance of probabilities (See **Salim Zia** c. **State of U.P.** (AIR 1979 SC 391) & **Munshi ram** v. **Delhi Administration** (AIR 1968 SC 702). Here, PW1, PW3, husband of PW1 & deceased were trying to dig property to get water and that property was claimed by A1 as his own and he obtained injunction order against them. When accused stated that it is disputed property and it is cultivated by him, prosecution witnesses did not heed the same and deceased encouraged the same and struggle occurred. Presence of several injuries on the accused makes plea of self defence plausible as held by the Apex Court in **State of Karnataka** v. **Jinappa Payappa Kudachi and others** (1993 Crl.L.J. 3915). Here, injuries on A1 are not superficial. Even though PW1 tried to explain that the

accused must have sustained injuries by themselves, she once stated that she has not seen whether any injuries were caused to the accused. She was of the view that deceased and supporters did not cause any injuries. Same is the case of PWs 2 and 3. There was a counter case. F.I.R. in the counter case was not produced by the prosecution. It is clear from the evidence that PWs 1, 3, husband of PW1 Sirajudheen as well as deceased were on one side and first accused, his wife and children (A2 to A4) were on the other side and when PW1 and party came and tried to dig the pond where A1 claimed title and possession and got an injunction (injunction order was in force on the date of incident), that was resisted by A1 and A2 and there was a struggle. The injuries noticed in the postmortem certificate, the abrasions and contusions on the deceased shows that the injuries on the deceased can be caused in a struggle. Evidence of doctor supports the plea of private defence. When there was an injunction, deceased or PW1 etc. had no reason to go to the place for taking water especially when PW1 has stated that they had a well in their compound and on the previous day they had used water from that well. So, the injuries were occurred to the deceased while A1 and group tried to protect their property right and they also obtained an injunction order against deceased, husband of PW1 etc. and the incident occurred at the disputed place. Non-examination of material witnesses, the husband of PW1 &

son of the deceased, who were admittedly present there, also is a serious matter on the facts of this case. The injuries on the first accused, injunction order obtained by him, the fact that the people against whom injunction order was subsisting have entered into the property with tools for digging the land and started digging and totality of the facts show that plea of private defence taken by accused is a probable defence. Then the question is whether A1 has exceeded the right of private defence. When accused is acting for protecting his property and person, his action cannot be measured in golden scale. From the exaggerated evidence of PWs 1 to 3 it cannot be stated that he has exceeded the right of private defence and even though the prosecution has stated that the deceased was unarmed and the injuries were caused on the accused by their own weapons, it is not digestible as evidence of PW3 shows that A2 to A4 came after the deceased fell down and from the evidence it can be seen that, that part of the prosecution evidence against A2 to A4 cannot be believed. Here, trial judge acquitted A2 and A4 and no appeal is filed against that. Hence, we are concerned only with A1 in this appeal. It is also pertinent to note that no injuries were inflicted on the deceased on the vital part of the body which shows that murder was not the intention. At the same time, from the injuries inflicted by A1, the deceased died. But, we have already held that his plea of

private defence is acceptable. If at all the accused has exceeded the right of private defence, he has already suffered about three years imprisonment and that will be sufficient even though conviction is changed from section 302 to section 304 part II.

8. There is also another serious error of procedure committed by the trial Judge. On going through 313 statement, we are of the opinion that incriminating events and circumstances were not put to the accused. We also note that in 313 statement, no signature of the accused was obtained in each page except in the last page. We also note that the common 313 statement was taken jointly from all accused. Except for the last question written in the last page wherein three different answers are given; with regard to other questions only one answer is given. Proceedings would not show which of the accused gave the answer or whether one accused was authorised by the other accused to answer the questions or whether such answers were given by all the accused together.

9. Section 313(1) of the Cr.P.C. is as follows:

> "**S.313. Power to examine the accused.**- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-
> (a) may at any stage, without previously

> warning the accused put such questions to him as the Court considers necessary;
> (b) shall after the witnesses for the prosecution have been examined and before he is called on for his defence question him generally on the case:
>
> Provided that in a summons-case where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).”

In **Parsuram Pandey & Ors.** v. **State of Bihar** (AIR 2004 SC 5068) Apex Court observed as follows:

> “We have perused the statement under S.313 Cr.P.C. and the question formulated by the trial court in the present case and we may say that it is far from satisfaction. This Court time and again has laid down that it is obligatory on the part of the trial Court to examine the accused for the purpose of enabling the accused personally to explain any circumstance appearing in evidence against him. If such opportunity is not afforded, the incriminating piece of evidence available in the prosecution evidence against the accused cannot be relied upon for the purpose of recording the conviction of the accused person. It is imperative on the Court to record the statement under Section 313 Cr.P.C. of the accused persons so as to give opportunity to the accused persons to explain any incriminating circumstance proved by the prosecution. The duty cast on the Court cannot be taken lightly.”

As held by the Hon'ble Apex Court in **Kalapnath Rai** v. **State** ((1997) 8 SCC 732) it is imperative that each and every

incriminating circumstances revealed from evidence must be put to the accused separately and their answers recorded also separately. Even if allegations are common each accused shall be given such an opportunity separately.

10. In this case, we have already noticed that who answered the 313 question is not mentioned in the order sheet. A common questioning is done and except in the last question, common answer is recorded. A separate 313 statement ought have been taken from each of the accused, even if the incriminating circumstances are same, separate questions, even if questions are identical should be put so as to get answers from each of the accused. Here, since different overt acts are alleged, at least separate questions ought to have been put regarding the same. But, a remand is necessary only if prejudice is caused as held by the Supreme Court in **State (Delhi Administration)** v. **Dharampal** (AIR 2001 SC 2924). Since we have held that accused is entitled to right of private defence and even if the accused exceeded the right of private defence, his conviction can only be under Section 304 Part II and not under Section 302. He has already suffered the imprisonment. Hence, there is no need for a remand from the stage of 313 statement on the ground of alleged prejudice caused to the appellant due to wrong procedure.

11. In the result, while accepting the plea of right of private defence, considering the injuries inflicted, conviction and sentence of the appellant under section 302 of the Indian Penal Code is set aside and he is convicted under section 304 part II of I.P.C. The imprisonment he has undergone is sufficient sentence. Hence, the accused should be released forthwith, if he is not required in any other case.

The appeal is partly allowed.

J.B.KOSHY
JUDGE

T.R.RAMACHANDRAN NAIR
JUDGE

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